DOCUMENT RESUME

ED 153 223 CS 204 051

AUTHOR	Nichols, John E.
TITLE	The Tinker Case and Its Interpretation. Journalism Monographs No. 52.
INSTITUTION	Association for Education in Journalism.
PUB DATE	Dec 77
NOTE	43p.
AVAILABLE FROM	Prof. Harold Wilson, AEJ Publications Manager, School of Journalism and Mass Communications, University of Minnesota, Minneapolis, Minnesota 55455 ($2.50)
EDRS PRICE	MF-$0.83 Plus Postage. HC Not Available from EDRS.
DESCRIPTORS	*Civil Liberties; Court Cases; *Court Litigation; *Freedom of Speech; Higher Education; *School Newspapers; Senior High Schools; *Student Publications; *Student Rights; Supreme Court Litigation
IDENTIFIERS	*Tinker v Des Moines Independent School District

ABSTRACT

In 1969, in the case of Tinker vs. the Des Moines Independent Community School District, the Supreme Court ruled that if student speech acts did not interfere, or threaten to interfere, with the operation of the school, the acts could not be banned. This study is an analysis of the Tinker decision and of the ways it has been applied to court cases involving the high school and college student press. The first section discusses the facts in the Tinker case, lower court decisions regarding it, the arguments before the Supreme Court, the Supreme Court's decision, and the theory behind the case. The second section discusses court cases since the Tinker decision that have involved student press rights and have dealt with the following questions left vague or unanswered by the Tinker decision: What is "material and substantial interference" with school activities? When do forecasts of interference justify sanctions? Does the Tinker decision authorize prior restraint? Does the decision justify restraint, or only punishment? and, Must officials try to quell those who disturb the peace in reaction to expression before regulating the expressors? (GW)

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ED153223

JOURNALISM MONOGRAPHS

NUMBER FIFTY-TWO • DECEMBER 1977

BRUCE H. WESTLEY, *Editor*

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JOHN E. NICHOLS

The Tinker *Case and Its Interpretation*

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JOHN E. NICHOLS is an assistant professor of mass communications at Middle Tennessee State University. He holds a B.S. degree from Purdue University, an M.S. degree in journalism from Boston University and a Ph.D. in mass communications from the University of Wisconsin-Madison. The material reported here is derived from his dissertation, "Federal Constitutional Protection of Freedom of the High School and College Student Press," which was supervised by Harold L. Nelson. Publication of this issue has been funded by the Subcommittee on Research, Middle Tennessee State University.

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CONTENTS

Introduction 1
The *Tinker* Case 2
Interpretations of *Tinker* 11
Summary and Conclusions 31
NOTES 33

(*Prior Publication*)

INTRODUCTION

IN 1969, in the case of *Tinker* v. *Des Moines Independent Community School District*, the Supreme Court established the rule of law that revolutionized court doctrine applicable to freedom of the public school student press. (The private school student press, still largely unprotected, is not considered here.) It held that if student speech acts did not interfere, or threaten to interfere, with the operation of the school, the acts could not be banned.[1]

The new doctrine marked a major change from previous doctrine, which left student freedom of speech, and other constitutional freedoms, unprotected against invation by school officials. The main rationales supporting this lack of protection were two: 1) education is a privilege given those who consented to the rules and conditions established by the state, and 2) schools and colleges stand *in loco parentis*—in the position of a parent—to their students, and might make and enforce whatever rules a parent might to help insure the wellbeing of their charges.[2] This lack of protection held sway until the 1960s, when lower court decisions preceding *Tinker* by a few years began to mandate procedural and substantive constitutional freedom for students, on a limited geographical scale.[3]

The *Tinker* decision has been applied to areas other than the student press: to strike down restrictions against appearance on college campuses of outside speakers, restrictions against peaceful campus demonstrations, refusal to recognize non-school organizations, and, particularly in some decisions at the secondary level, restrictions against certain styles of hair and dress.[4] This study is an analysis of the *Tinker* decision and of the ways it has been applied to protect—and occasionally to fail to protect—the student press.

THE *TINKER* CASE

TINKER v. *Des Moines Independent Community School District,*[1] 1969, established a federal right to freedom of expression for students. It adopted the rule that in the absence of a finding and a showing that engaging in the expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the expression may not be prohibited.[2] *Tinker* has been a powerful vehicle for protection of student rights of expression, having been cited in more than 500 cases dealing with student (and sometimes non-student) expression.[3]

The Facts

The case arose when in December, 1965, a group of adults and students in Des Moines decided to publicize their objections to the Vietnam war by wearing black armbands during the Christmas season. Among them were Mrs. Leonard Tinker, whose husband was a Methodist minister serving for the American Friends Service Committee as "Peace Education Secretary" in Des Moines, and Mrs. Margaret Eckhardt, an officer in the Women's International League for Peace and Freedom. The Tinker children, John F., 15, and Mary Beth, 13 (Hope, 11, and Paul, 8, did not become involved in the court case), and Christopher Eckhardt, 16, decided that they would wear black armbands to their schools.[4]

Hearing of the plan, and fearing the wearing of armbands would disrupt the schools, the principals of the Des Moines schools adopted a policy that students wearing armbands to school would be asked to remove them, and if they refused they would be suspended until they returned without them.[5]

On December 16, Mary Beth Tinker and Christopher Eckhardt wore black armbands to their schools. Mary Beth was suspended. Christopher was called to the principal's office, where, he said, he was told that wearing armbands would bring bad publicity to the school, and by one official that wearing the armband was "going to look bad on his record" and that "the colleges didn't accept demonstrators or protestors." He said:

> [S]he thought I was too young and immature to have too many views, and thought I ought to take the arm band off, and they let me know while I was

going to be out of school that I could probably have plenty of time to look for a new school to go to and I told them I liked Roosevelt and I wanted to come back, and they said that if I did anything like this again I wouldn't come back to Roosevelt.

Christopher refused to remove the armband, and was sent home.

The next day, John Tinker wore an armband to school. He had not worn the armband the previous day because he had not wished to defy the principals "without even trying to talk to them first," he said. But he said he changed his mind after the president of the Board of Directors of the Des Moines School District, Ora E. Niffenegger, refused a request of students to call a special meeting of the board to discuss the armband situation. John wore the armband through the morning and into the afternoon, when he was sent to the principal's office and asked to remove it. When he refused he was sent home.

After the Christmas vacation the children returned to school without the armbands. On March 14, 1966, through their fathers, they filed a complaint in the U.S. District Court for the Southern District of Iowa, seeking an injunction to restrain school officials from suspending or otherwise disciplining students for exercising their right of free speech.

Lower Courts Defer to School Officials

The District Court found the wearing of an armband a symbolic act within the protection of the First Amendment's free speech clause, but refused the injunction and damages on the ground that school officials' actions were under the circumstances reasonable. The court said school officials had a right and an obligation to prevent any activity which "might" be disruptive of a disciplined atmosphere in the classroom. While the armbands themselves might not be disruptive, the court said, reactions from other students would be likely to disturb the classroom. The court said students' freedom of speech was infringed upon only to a limited extent, since students were free to wear armbands off school premises, and could give their views on the Vietnam war in the classroom "during any orderly discussion" of the subject.[6]

The court held that if "a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court."

Thus the court concluded the regulation did not deprive the students of their constitutional right to freedom of speech.[7] The students appealed to the Eighth Circuit Court of Appeals, which split four to four on the issue, thus leaving in effect the lower court decision. The court's *per curiam* opinion did not state the reasoning followed by either side.[8] The students applied to the Supreme Court for a writ of *certiorari*, which was granted.

The Arguments Before the Supreme Court

The main arguments before the court were whether speech should be allowed to be regulated on the basis of a vague but undocumented feeling that it is "reasonable" to do so, or whether evidence of a specific and immediate danger to the school should be required.

The students contended that expression may not be regulated on the basis of "reasonableness," or on speculation that great evils might follow; instead, there must be evidence of a "clear" or "imminent" danger arising directly from the conduct of the expressors.[9] Agreeing was the National Student Association (NSA), which, as a friend of the court, said expression may not be suppressed unless and until it "imminently threatens orderly operation of the classroom or other school facility." The interests school officials had asserted—in requiring uniform student garb, in protecting other students from seeing armbands, in preventing the possibility of disturbance caused by students who had had friends killed in Vietnam—were too insubstantial to justify suppression of expression, the NSA said.[10]

Students and the NSA both attacked the armband regulation as an unconstitutional prior restraint, on the ground it was absolute in nature and was to be applied regardless of whether the armbands caused disorder. They added that it was constitutionally impermissible to suppress expression because of fear of disruptive reactions from other students, for to allow such auppression makes the right to speak only "the meaningless right to agree." If reactions of students to the expression had disturbed the school, the NSA said, officials should have disciplined them rather than the expressors.[11]

Finally, students attacked the regulation as discriminatory because it had not covered such items as political campaign buttons

and the Iron Cross (the symbol of Naziism), both of which had been worn in Des Moines schools.[12] The students argued that the court had a long tradition of protecting the rights of students against infringements by school authorities, citing cases in which the court had held states could not prohibit teaching young people foreign languages, or their matriculating in private or parochial schools, and could not compel them to salute the American flag.[13]

School officials relied basically on old state cases giving them discretion to pass and enforce "reasonable" rules and regulations. They said that in school discipline cases courts should determine only whether school officials had abused their discretion, and not substitute their judgement for that of school officials. Further, they contended the armbands and the debate over the armband regulation had threatened disorder: a crowd at a school board meeting called to discuss the regulation had verged on being disorderly; and one student had claimed another had struck him because he was wearing an armband. But for the prompt action by school administrators, they asserted, major disorder might have resulted.[14] Finally, they contended schools are not appropriate places for demonstrations, relying on cases in which it had been held or stated that state property is to be considered akin to private property when weighing the propriety of demonstrations there.[15] But their arguments were unsuccessful.

The Supreme Court Decides

The Supreme Court held in favor of the students, adopting in a split decision—composed of a five-member majority decision, two concurrences and two dissents—the rule that in the absence of a finding and a showing that expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the expression may not be prohibited.[16] It was not the first court statement of that rule. The rule had first been established by the Fifth Circuit in the 1966 cases, *Burnside* v. *Byars* and *Blackwell* v. *Issaquena County Board of Education*, which involved the question of whether school officials could ban wearing of "freedom buttons" by black students in Mississippi high schools.[17] Henceforth, after *Tinker*, notions of "reasonableness" or school authorities' vague fears that expression would lead to disorder were not to suffice for the

prohibition of expression. Both a factual showing by school officials that disruption was likely, and a finding by the court that such was the case, would be necessary.[18]

The wearing of the armbands was symbolic speech which, according to the majority opinion by Justice Abe Fortas, since it had been divorced from any actually or potentially disruptive conduct, was akin to "pure speech," which the court has consistently held protected. It had been the "unmistakeable holding of this court for almost 50 years," the court said, that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court cited many cases. The earliest were two 1923 cases, *Meyer* v. *Nebraska* and another case, striking down state statutes forbidding the teaching of foreign languages to young students, for the reason, the *Tinker* court said, that the statutes "unconstitutionally interfered with the liberty of teacher, student, and parent."[19] And the court noted that in the flag salute case of *West Virginia State Board of Education* v. *Barnette*, the court had said:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for the scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[20]

The court also cited several other cases involving teacher speech, prayers in schools and state proscription of the teaching of evolution.[21]

The court made much of the fact that the students' conduct had been silent and non-disruptive, pointing out both that there was no evidence of any disruption—not even of one class—and no evidence the armbands would cause future disruption. Although a few hostile remarks had been made outside of classrooms to students wearing armbands, there were no threats or acts of violence on school premises, the court said.[22] Indeed, there was no evidence in the record to indicate that the wearing of armbands would have substantially interfered with the work of the school.[23] In the absence of such a showing by school officials, and such a finding by the court, wearing of the armbands could not be prohibited. Thus *Tinker* adopted, and made a nationwide rule of

law, what had been the practice under *Burnside* and *Blackwell*: if courts were to uphold their censoring or punishing of expression, school authorities would have to make a positive showing of facts that the expression would interfere with the purposes of the school. Seven times the court mentioned the necessity of such a showing and finding.[24] No longer, the court held, could courts blindly defer to the undocumented contentions of school officials that the expression would have disrupted the school. The court said:

> **[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression. . . . Any variation from the majority's opinion may inspire fear. . . . start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength . . . independence and vigor. . . .**[25]

The court cited for these propositions the 1949 case of *Terminiello* v. *Chicago*, which held that a speaker who "vigorously, if not viciously" criticized various political and racial groups, thereby stirring his audience to anger and alarm, could not constitutionally be convicted of breach of the peace.[26]

The court took note also that the armband regulation had been discriminatory (school officials had not prohibited the wearing of all political symbols—only black armbands), and that was not permissible "at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline."[27]

The court rejected school officials' contention that school grounds should be treated as private property. Schools are not decicated, the court said, only to providing facilities for formal instruction. They are dedicated as well to "personal intercommunication among students," which, besides being an inevitable part of students' activities, is also "an important part of the educational process." Thus, it was held, students are entitled to express their opinions on controversial subjects if they do so without disturbing the school.[28]

The general rationale of the court's decision was the libertarian idea that truth, or at any rate the best functioning of society, would emerge from free debate in the "marketplace of ideas." The court said:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues rather than through any kind of authoritative selection."[29]

The court quoted from Justice James C. McReynolds' opinion in *Meyer*, which the court said repudiated the principle that a state might conduct its schools so as to "foster a homogeneous people:"

> In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it will hardly be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.[30]

In concurring opinions, Justices Byron R. White and Potter Stewart expressed qualifications. Stewart said he thought that in some narrowly limited areas children might be given lesser freedom of expression than adults. White said he understood the decision to recognize that expression by disruptive conduct is not accorded the same protection as expression by words.[31]

Justice Hugo L. Black, in a long and emphatic dissenting opinion, said: 1) courts ought to leave to school officials the decision as to whether rules restricting freedom of speech of students are reasonable; and 2) schools are not appropriate places for demonstrations or expressions of views, but places where students are to absorb what the state deems fit to teach.

Black denied the court had "unmistakeably" held for the past 50 years that students and teachers carry into the school their constitutional rights of expression. He asserted that *Meyer* had not so held, but merely that a statute barring the teaching of the German language to young children was "unreasonable." And, Black said, the doctrine that courts could strike down laws and rules they thought unreasonable is no longer valid. He did not respond to the nine other cases cited by the majority in documenting its assertion that it had long been concerned with protecting the rights of teachers and students—save for the *Barnette* case, which he differentiated on the basis that it involved state compul-

sion of expression, not restriction, and in addition, religious considerations.[32] He declared that courts should leave to the state the decision as to what conduct is harmful to the operation of the school.[33]

Black, stating a position he had taken in several other cases, said he believed persons have no right to demonstrate or give speeches on public property dedicated to purposes other than expression.[34] The purpose of schools, he said, is to teach students, not to allow them to "broadcast political or . . . other views" to educate the public; "children" were not sufficiently mature or wise for that.[35] To Black the marketplace theory did not apply to children in school. In this he went farther than Stewart, who would at least allow armbands. Black concluded that the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[36]

Dissenting also was Justice John Marshall Harlan, who said those complaining of abridgement of freedom of speech should be required to prove that school officials acted from other than legitimate school concerns.[37]

The Theory of Tinker

Tinker rests on the theory of the marketplace of ideas: free discussion is to be allowed to the point where the work of the classroom is disrupted, just as, in the non-school world, free discussion is to be allowed until there is a probability it will bring about a grave evil. Students have the right, with their words, to bring about changes in the school—if their words will do so. And they have the right to make the school a hotbed of revolutionary rhetoric—as long as actual revolution is not a likely result.

The *Tinker* "material and substantial interference" standard is similar to standards used in the non-school world to decide when speech may be punished. It is similar in wording—though not in the way it has sometimes been applied[38]—to the "clear and present danger" standard first stated in *Schenck* v. *United States*, 1919:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[39]

It is similar also, both in wording and as applied, to the "incitement to action" standard of *Brandenberg* v. *Ohio*, 1969:

> [T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[40]

The three standards are similar in that they require that the danger be 1) clear, 2) substantial, and, to some degree, 3) imminent. (That the clear and present danger standard as applied in national security cases usually required neither clarity nor imminence of danger is noted in n. 38.) That the *Tinker* standard appears similar to the *Schenck* and *Brandenberg* standards, which have been used in cases involving punishment of expression rather than restraint, makes it appear that *Tinker*, too, authorizes punishment, rather than restraint. But inasmuch as some lower courts have interpreted the case as authorizing restraint,[41] one should look at what in *Tinker* supports and does not support such an interpretation.[42] The case does not cite as precedent any prior restraint cases, and does not use the term "restraint" at all. Instead, it says expression may be "prohibited" (using the term "prohibit" or its forms four times, and "deny," "forbid," and "regulate" or their forms once each). The Supreme Court has identified as a form of restraint regulation by licensing, banning distribution of literature in the absence of permission by administrative authorities.[43] Plainly *Tinker* does not authorize this form of restraint unless authorities can factually demonstrate disruption of classes or a strong threat of it. Neither does the case authorize or support restraint by court injunction in the absence of such evidence of disruption. What about the classic form of restraint—pre-publication examination and screening of copy? No formal system of review was involved in the case, so it seems *Tinker* should not be taken as authorizing such an arrangement. One could argue that because an informal system of review was used—principals in a meeting decided black armbands should be screened but did not halt other symbolic expression—that should be taken as authorizing a formal system. But this method of deciding what expression would be banned was not labeled a formal screening system by either the plaintiffs, defendants or the court, and it was decidedly not systematic. There is no evidence in the court records that the principles even

considered whether other kinds of expression should be banned. Thus to say that *Tinker* authorizes a formal system of pre-publication examination of copy is to stretch *Tinker*. It is certain that the case does not authorize prevention of dissemination of material that there is not good evidence to show would cause disruption.

INTERPRETATIONS OF *TINKER*

THE MEANING of any Supreme Court case, including *Tinker*, is never fully clear on its face. Each case leaves questions unanswered, for it rules on only the precise points at issue in the controversy at hand.[1] It is for lower courts (or future Supreme Court cases) to interpret the language in Supreme Court cases, and to determine when and how the rules of law stated in those cases are to be applied, and apply them.

Tinker left several points vague or unanswered. What, for example, is "material and substantial interference" with school activities? There had been no such interference in *Tinker*, so the minimum degree of disruption that would meet that standard was left undefined. Also unspecified, and left for decision by lower courts, was how strong a factual showing of threatened interference with school activities would be necessary in order to justify a sanction. And, to what extent would courts defer to the contentions of school officials that disruption had occurred or was likely? Did *Tinker* justify restraint, or only punishment? Must officials try to quell the disruptive reactors to expression before regulating the expressors? These questions are now examined.

What is "Material and Substantial Interference"?

When one attempts to arrive at an operational definition of "material and substantial interference," one is faced with a startling fact: in only one literature distribution case in which there was actual interference with school functions was that interference held to have been "material and substantial." (Another case held there had been interference, but as will be seen, there was none.) In very few cases was such interference even alleged. Despite the scarcity of evidence, by examining cases in which some interference occurred, or was alleged, one can gain a general idea about the necessary degree of interference.

High School. In five—counting two non-literature cases included for purposes of illustration—high school cases there was evidence of disruption of school functions. Involving the least amount of disruption was *Sullivan* v. *Houston Independent High School District* (*Sullivan II*), 1971, which arose after a student was suspended for distributing an underground newspaper.[2] School officials contended distribution of the paper had disrupted school activities, but they were able to furnish evidence of only one incident: a student had brought a copy of the newspaper to class and read it in a conspicuous manner. The teacher took it away. The court characterized the disruption as "negligible," concluded school officials had "completely failed" to demonstrate material interference with school activities, and ordered that the student be given credit for the work missed during his suspension.[3]

Similar was the *Burnside* case, which involved the wearing of "freedom buttons" by 30 to 40 black students at a Mississippi high school. The buttons, one-and-one-half inches in diameter and bearing the words "One Man One Vote" and the initials "SNCC" (Student Non-Violent Coordinating Committee), had been worn in violation of an order by the principal, and the principal suspended the offending students. But the court held the students' freedom of speech had been violated, for there were no facts to show the buttons had caused interference with the educational process: the record indicated "only a showing of mild curiosity" on the part of the other students toward those wearing the buttons. Since the buttons had caused no disruption, the court enjoined school officials from banning their use.[4]

Involving more disruption, but still an insufficient amount to justify punishment, was an earlier version of the *Sullivan* case, *Sullivan I*, 1969, which resulted when two students were expelled for distributing a newspaper that criticized and lampooned school authorities.[5] Three teachers testified they had had to take copies of the newspaper from students who had been reading them during class. One of the students had laughed aloud. One teacher took a copy from a student reading it before class. Another teacher claimed to have been interrupted during a lecture by a student who twisted around in his seat to look at a copy of the paper held by the student behind him. And two teachers said their classes had been interrupted by students wanting to talk about and

ask questions about the newspaper. These incidents constituted the whole evidence of disruption directly attributable to the newspaper, although an assistant principal said he believed distribution of the newspaper had caused a changed attitude among the students. "They had something on their minds that was causing them to be of great concern," he said.[6]

The court characterized the interruptions of class periods as being "minor and relatively few in nature," and said they did not constitute material and substantial interference, thus did not justify punishment.[7]

Apparently involving more disruption, and seemingly holding it was sufficient to warrant suspension of students, was *Baker* v. *Downey City Board of Education*, 1969, a poorly written decision not clear as to its facts or its reasoning.[8] The case dealt with alleged disruption caused by an underground newspaper containing vulgarity and distributed near the gates of the school.

The court spent little space in recounting evidence of the disruption. "A few" teachers had testified that there had been unspecified "disruptions" in their classrooms. The principal had testified that "twenty-five to thirty" teachers had told him of classes being interrupted by students reading and talking about the newspaper. Without discussing the amount of disruption, or discussing the meaning of the phrase "material and substantial," the court appeared to hold that the amount of disruption was sufficient to justify punishment—although it did not explicitly say so. It cited the *Tinker* interference test, and contrasted the present circumstances with *Tinker* and *Burnside* on the ground the expression there involved "did not disrupt the educational program of the school[s] involved."[9]

Involving even more disruption, and holding it was material and substantial, was *Blackwell*. The case again involved "freedom buttons"—this time picturing a black hand and a white hand joined together, with the initials "SNCC." Up to 200 students wore them to a Mississippi high school in February, 1965. Upon hearing the buttons had caused a disturbance, the principal banned them, but the ban had little effect: more students began to wear them. Finally, the principal suspended a total of about 300 button-wearers. Some of the children's parents brought suit.[10]

The court upheld the principal's actions on the ground that distribution of the buttons had substantially disrupted the school: "There was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum."[11] Evidence indicated approximately 150 students came to school wearing the buttons, and accosted other students in the corridors, trying to persuade them to wear the buttons, and pinning them on the clothes of some of the students, whether they wanted them or not; after they had been suspended, some students before leaving school walked through the school trying to pin buttons on students walking in the halls, and some students threw buttons through windows into the school; a bus driver walked through the building with a box of buttons, distributing them in the hall, and without permission entered a classroom and began distributing them. Some students, upon being asked to remove the buttons, were said to have "displayed a nasty attitude," called the principal an "Uncle Tom," and one to have been "intolerably obnoxious."[12]

The court found the ban against the wearing of the buttons reasonable, noting *Burnside* had defined a reasonable regulation as one which is " 'essential in maintaining order and discipline on school property' and which 'measurably contributes to the maintenance of order and decorum within the educational system.' "[13]

The court found it necessary to ban both the distribution of the buttons, which had caused the disruption, and the wearing, which apparently had not. It said the distribution "was so inexorably tied to the wearing of the buttons that the two were not separable."[14] The reason for that statement is unclear, however, for the court apparently gave no thought to a rule punishing those who did disrupt the school, which might have solved the problem, as might a rule proscribing distribution at certain times, and in certain places and manners.

College. No college cases have involved actual disruption of educational activities, and no post-*Tinker* cases have involved a finding of actual disruption. One early pre-*Tinker* case made a finding of disruption despite the fact that there had been none. The decision is inconsistent with post-*Tinker* law, thus would probably not stand today. Although the case occurred before *Tinker*, it occurred after *Burnside* and *Blackwell*: the "material

and substantial interference" standard was in existence. All but the Supreme Court ignored it. The case was *Jones* v. *State Board of Education of Tennessee*, in which federal trial and appeals courts upheld the suspension of two students from Tennessee A & I State University, Nashville, for distribution of literature and other expressive acts.[15]

The literature distributed by one of the students, Kenneth R. Jones, recited a number of grievances against the state legislature, the National Guard, and city police, called university administrators "puppet fools" and "trembling, powerless idiots," and ended:

> CAST YOUR VOTE FOR *STUDENT POWER* ! ! !
> BOYCOTT REGISTRATION SEPTEMBER 23 AND FOR AS LONG AS THE PUPPET ADMINISTRATION REFUSES TO ACKNOWLEDGE THAT THIS IS *OUR* UNIVERSITY!
>
> SNCC

Content of the literature distributed by the other student was unspecified. (He had also been charged with, and found guilty by a university committee of, "gross disrespect" to university officials and "speaking in a disturbing manner" in the library.[16])

No evidence of disruption of university functions was given in any of the court opinions. The District Court simply asserted that the case was similar to *Blackwell*, where there had been disruption, and then made the general finding that the faculty committee "in each one of the findings concerning speaking or leafleting could justifiably have found from the evidence that the actions of the plaintiffs promoted unrest and disrupted the normal educational functions of the University."[17] The Court of Appeals in a brief, almost perfunctory opinion affirmed, holding the students had been disciplined "for conduct other than the type of activity which is entitled to constitutional protection."[18] Jones applied to the Supreme Court for *certiorari*, which the court first granted, but then reversed itself and rescinded (on the ground Jones had lied to a faculty committee).[19] (Justices William O. Douglas and William J. Brennan Jr. dissented from the dismissal on the ground that circulation of the leaflets had caused no disruption, stating: "it would seem . . . that it is immune from punishment, censorship, and any other form of retaliatory action."[20])

In another case, there was violence on a college campus as a result of publication—but the violence was not held to constitute material and substantial interference with school activities. The case was *Jones* v. *Board of Regents of the University of Arizona*,[21] and the publication was not a newspaper but a sandwich-board sign and handbills.

In November, 1965, Ashton Jones stood near the Student Union building on the campus of the University of Arizona at Tucson, wearing a sandwich-board sign reading, "Help Stop Viet Nam war now. For Peace and Freedom," and began distributing to passersby handbills critical of this country's involvement in the war. A small crowd gathered, and conversation ensued about the war. The crowd had grown to 25 to 30 persons when two bystanders approached Jones, tore the signs from his back and chest and destroyed them. Jones left after passing out all his leaflets. Twice the next day he reappeared, and both times he was removed by campus police. He then brought suit, claiming violation of his First Amendment rights. After an adverse District Court decision,[22] the Court of Appeals held that the fact that two persons had ripped away Jones' signs did not justify the police action—in fact, Jones had the right to police protection while exercising his rights of expression. The Regents were ordered not to interfere with Jones' right to express himself on campus in areas generally open to the public.[23] The court did not cite the Tinker interference test, probably because it was obvious that although there had been interference with Jones' activities, there was none with school activities.

The fact that in no other cases was there evidence that publication had caused disruption of school activities tempts one to believe that disruption as a result of publication is rare.[24] It also means it is impossible to gain a precise idea about the amount of disruption that would justify a sanction. Among all cases involving actual disruption, including the non-literature cases *Burnside* and *Blackwell*, the following degrees of disruption were insufficient to warrant regulation: 1) one student conspicuously reading a newspaper in class (*Sullivan II*); 2) the peering of students in class at buttons worn by others (*Burnside*); and 3) several students reading newspapers during class, one laughing; another student twisting around in his seat to look at a newspaper, and students "interrup-

ting" classes to ask questions about the paper (*Sullivan I*). Courts considered these problems insignificant, and noted they were easily quelled. But the following degrees of disruption were held sufficient to warrant regulation: 1) unspecified "disruptions" in "a few" classrooms, and "interruptions" of classes caused by students reading and talking about the newspaper, reported by "twenty-five to thirty" teachers—extent and success of teachers' efforts to quell these incidents are not reported (*Baker*); and 2) interruption of a few classes by distribution of "freedom buttons," and substantial disturbance in the hallways, described by school officials as a "general state of confusion" caused by as many as 150 students walking through the halls and pinning buttons on other students whether or not they wanted them (*Blackwell*).

Anyone striking an average on the basis of these cases would find that the point at which interference with school activities resulting from publication justifies invocation of a sanction falls between the amounts of interference in *Sullivan II* and *Baker*: more than inattention to classwork by several students, but perhaps less than inattention by students in "twenty-five to thirty" classrooms. But striking an average may not be the best way to arrive at an answer: *Baker* and *Blackwell* do not appear to have given a full measure of constitutional protection.[25]

One study found a significantly higher degree of disruption required to justify regulation. Robert Stuart Strevell, after analyzing about a dozen cases, mostly involving expression other than writing (often long hair), concluded that the common element in cases allowing regulation or punishment was violence or the threat of it—fights, forced haircuts or verbal abuse expected to lead to fights—over a long period of time, to the extent that school activities are disrupted by student tardiness or absenteeism, "difficulties" during physical education classes or interruptions of other class routines.[26]

The Supreme Court has given some guidance in the matter, saying that schools need not tolerate conduct that "substantially interferes with the opportunity of other students to obtain an education."[27] And, speaking of demonstrations near schools, it said: "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse."[28]

These *dicta* seem to indicate that a higher degree of interference with the work of the schools would be required than was involved in any of the foregoing cases, save perhaps *Blackwell*. One does not know what courts will do, but Strevell's definition of material and substantial interference seems in accord with the proper application of constitutional law: "the quantum of disruption from student speech acts which exceeds the ability of an ordinary school faculty and administration to effectively control through the use of ordinary disciplinary measures without having to resort to proscription of the speech act itself."[29]

When Do Forecasts of Interference Justify Sanctions?

Tinker indicated that not only actual disruption would justify regulation of expression—forecasts of disruption, if factually based, would also suffice. The factual base was absolutely necessary, the court had indicated: "undifferentiated fear or apprehension of disturbance"—a forecast unsupported by sufficient evidence—would not suffice to overcome the right to freedom of expression.[30] The question of the strength of the factual showing necessary to overcome that right has arisen in 14 cases. Only three found the evidence sufficient to allow sanctions.

High School. In only one high school case did a court squarely uphold a sanction based on a forecast of disruption. In all other cases in which the issue was squarely faced sanctions were disallowed because school officials had been able to furnish little or no evidence to support the forecasts. In essence they had contended the content was or would be on its face sufficiently inflammatory to cause disruption. They had not shown that a heightened state of tension at the school made necessary a restriction on expression.

Courts have struck down: 1) a rule barring distribution on school property of material "alien to school purposes," over the argument the rule was necessary to prevent political and social agitation from disrupting the educational process; 2) the restraint of a sex-education supplement to a high school newspaper, over the argument its distribution would cause a clear and present danger of "substantial evils;" 3) and 4) in two instances, restraint of underground newspapers containing vulgarities. Officials in one had argued distribution "*might* incite lawless action," and "*could*

substantially disrupt normal educational activities;" 5) the restraint of an editorial in a school newspaper accusing high school athletes of smoking and drinking. The principal had considered the article "reasonably likely" to cause interference with school activities, and the faculty adviser to the paper had said it was written to "shake up some people;" 6) suspension of students who had advocated in an underground newspaper that students throw away administrators' notes to parents; and 7) a rule barring the distribution of "partisan" publications and "propaganda," which, it was feared, besides physical disruption would cause "intellectual disruption"—would make students think of something other than schoolwork, and lose respect for teachers.[31]

In each of the above cases the sanction was disallowed because school officials were able to give little or no evidence of threatened physical disruption: as the courts often specifically noted, the officials' fears constituted the mere "undifferentiated fear or apprehension of disturbance" *Tinker* held was insufficient to overcome the right to freedom of expression. The "intellectual disruption" argument was essentially treated as irrelevant, although it was noted teachers have the right to control class discussion.[32]

The only high school case[33] to squarely allow a sanction—it was restraint—based on a forecast of disruption involved a pre-existing state of tension at the school. It is a point that is important: in the absence of a pre-existing heightened degree of tension no high school cases have been able to justify a sanction. The only high school case to do so was *Karp* v. *Becken*, 1973, a case that involved signs distributed to students to protest the dismissal of a teacher. The situation arose at Canyon Del Oro High School in Pima County, Ariz., where, to protest the dismissal of an instructor of English, several students planned to disrupt an athletics awards ceremony with a chant and "walkout." Steven Karp, one of the students, left the school building, got from his car signs with a message in support of the instructor, and brought them back to a group of students who had gathered at the school before the planned demonstration. The vice principal ordered the students to surrender the signs, and all did so, including Karp. Then Karp brought suit, claiming infringement on his First Amendment rights.[34]

The court held restraint of the expression was justified because officials had a sufficient factual basis for forecasting material interference with the work of the school. The record showed the following facts:

> The high school Principal and other school officials testified that the school athletes had threatened to stop the proposed demonstration.
>
> The assembly was cancelled because school officials feared a walkout might provoke violence.
>
> Later in the morning, newsmen appeared on campus and set up their equipment. During this time, appellant and other students, during a free period, were milling around the building talking with these newsmen.
>
> The Vice-Principal testified to his impression that there was a general atmosphere of excitement and expectation pervading the campus and classrooms. There was an intense feeling something was about to happen.
>
> Some students actually walked out from class, notwithstanding cancellation of the assembly.
>
> About the time when the assembly walkout would have occurred, someone pulled the school fire alarm, which, had it not been previously disconnected by the vice-principal, would have emptied every room in the entire school.
>
> Approximately fifty students gathered in the area of the multi-purpose room who talked among themselves and with news media personnel.
>
> Excited by the situation, twenty to thirty of the junior high students who share facilities with the high school and who were eating in the high school cafeteria during their lunch period, interrupted their lunch and ran into the area of the multi-purpose room to watch the group of students and news people gathered there. The junior high students ran about the group excitedly and, as a result, their supervisors determined their lunch period should be shortened and they were returned to their classrooms earlier than usual.[35]

It was at this point that Karp had distributed the signs. School officials testified that they had feared distribution of the signs would have provoked an "incident"—possibly violence. The court found the forecast not unreasonable, stating *Tinker* had not demanded a certainty that disruption would occur, but only the existence of facts that would "reasonably lead" officials to forecast substantial disruption.[36]

College. In college the situation has been the same: for the most part courts have disallowed sanctions because school officials have furnished no, or insufficient, evidence to support their forecasts of disruption. Such was the case 1) when officials at Texas Tech University "anticipated the possibility of some disturbance" because of allegedly "lewd, indecent, and vulgar" language in a

student paper; 2) when several persons made "verbal attacks" on student writers, and complained to college officials, after students at Rochester Institute of Technology published pictures of a semi-nude girl draped in an American flag; 3) when several persons made anonymous phone calls to campus police at the University of Arizona, threatening to remove by force an anti-war demonstrator who was distributing handbills; and 4) when the governor of New Hampshire threatened to veto the capital budget of the University of New Hampshire if the University did not stop such "socially abhorrent activities" by homosexuals on campus as holding a dance and distributing copies of newspapers called *Fag Rag Five* and *Fag Rag VI*.[37]

The courts in the above cases variously noted 1) that there had been no evidence that the work of the university or of any class had been disrupted, "no indication of that clear and present danger of a serious substantive evil necessary to justify invasion of constitutionally protected rights;" 2) that pictures of a semi-nude woman draped with a flag were not likely to incite to disorder; 3) that the demonstrator had the right to police protection while handbilling; and 4) that financial retaliation by the governor against a university because it maintained freedom of expression on campus would be an unconstitutional "attempt to abridge the rights guaranteed by the [First and Fourteenth] amendments."[38]

Two college cases, however, did uphold punishment on the basis of a forecast of disruption. One, *Norton* v. *Discipline Committee of East Tennessee State University*,[39] appears to have been decided in error. The forecast does not appear to have had a solid factual basis. The other, *Speake* v. *Grantham*,[40] did have a factual basis, for it involved the distribution of notices fraudulently announcing the closing of the university.

In *Norton*, the Sixth Circuit Court of Appeals upheld the suspension of eight students whom the university's discipline committee had found guilty of distributing on campus literature "of a false, seditious, and inflammatory nature."[41] The literature recited a list of complaints about actions of the university administration and made statements which both a district court judge and the Court of Appeals found an exhortation to disrupt university functions.[42] The statements included these:

And how has the ETSU student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students?—No. Have they been the forerunners of a new democratic spirit like Czech students?—No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students? No. . . . They have sat upon their rears and let the administration crap upon their heads. . . . Maybe students will get some sense and learn that this should cease and that the only way to see that it does is to stand up and fight. . . . Maybe . . . they will discover that there are student leaders, organizers to rally around so as to assault the bastions of administrative tyranny. . . . When we move against them, remember, like the man says, "Put up or shut up."[43]

The court, pointing out that 25 students had told a dean they wanted to "get rid of this group of agitators," found punishment justified on the ground that school authorities had forecast disturbances and had acted reasonably to prevent them by disciplining students. College authorities were not required to wait "until after the riot has started" but had the right to "nip such action in the bud," the court said.[44]

One judge dissented, stating the record contained insufficient evidence of disturbance. *Tinker* and many other Supreme Court cases, he pointed out, had held the judiciary must independently review the record to determine whether there is in fact strong evidence of a clear and present danger to a substantive state interest.[45] The visit by the 25 students to the dean did not indicate a sufficient danger, the judge said; the university had the duty to prevent the 25 from causing trouble, instead of abridging the rights of the students who had expressed "unpopular and controversial ideas."[46]

Further, the judge said, the Supreme Court had many times, the latest that very year in *Brandenberg* v. *Ohio*, rejected the notion that an unlawful disruptive effect could be inferred from inflammatory speech.[47]

But the Supreme Court refused to review the case, with three justices dissenting. [48] The dissenters, Justice Thurgood Marshall, and Justices Douglas and Brennan, said university officials had fallen far short of making an evidentiary showing of a high probability of future disruption, and had "demonstrated no more than the sort of 'undifferentiated fear or apprehension of disturbance' " which *Tinker* held is insufficient to overcome the right to freedom of expression.[49]

The other case to allow punishment of college students because of a threat of disruption caused by their written expression was *Speake*, 1970. The case is properly seen not as one in which disruption was threatened by speech, but as one in which it was threatened by conduct in the form of words. The students were suspended for having in their possession leaflets falsely announcing that classes would not meet during the two days prior to final examinations. Some 370 to 400 notices had been distributed. The leaflets said:

> **Due to the Violence at Jackson State and the Critical Situation on Our Campus CLASSES ARE SUSPENDED Monday, May 18, and Tuesday, May 19.**[50]

The academic dean testified he feared the notices could have caused (they were collected by authorities before being given widespread distribution) a general exodus from the university. He said that because at the time many colleges had suspended classes because of student unrest, it was feared students might not return for final examinations. Thus many students would not have received credit and some might not have graduated. The dean also mentioned possible problems with accreditation.[51]

The court said circulation of the false notices was not speech but action outside the protection of the First Amendment:

> **It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written or printed.**[52]

Thus the suspensions were upheld.

What can be learned from the three cases—*Norton, Speake* and *Karp*? *Norton* should be disregarded as a statement of constitutional law. In allowing punishment of expression because it was on its face inflammatory, it did not follow authoritative law, as stated in *Tinker* and *Brandenberg*. *Speake*, by contrast, ought not to be disregarded, but the case involved not speech but action carried out with words. And, regarding *Karp*, because it seems doubtful that printed communication will often initiate disorder, it is important to remember that *Karp* involved the distribution of signs into an already disorderly situation, not a peaceful one. It appears that situations like that in *Karp* are the only ones in which sanctions as a result of forecasts of disruption are likely to be

approved. It does not appear likely that literature will by itself often initiate disturbance. It requires time to read, and thought to understand and interpret. The process on the part of the reader is a physically passive one, done as a solitary individual. The reader does not actively participate in the process of communication as might an audience listening and responding as a speaker builds its excitement. It is possible that a story might anger its readers enough to elicit a physical response, but it appears unlikely that it would unless the schools in which the material was distributed were already in a state of tension, as were the schools in *Guzick* v. *Drebus*, 1969, or *Augustus* v. *School Board of Escambia County*, 1973.[53] In *Guzick*, a federal district court allowed the banning of the wearing of buttons and other insignia at a Cleveland high school for the reason that a state of racial antagonism and tension existed there. The court said:

> . . . Shaw High has a significant, perhaps serious, discipline problem. Students have been threatened in both the men's rooms and locker rooms, among other places. These threats have often been accompanied by violence. Money has been extorted from students under these circumstances. . . . There have been numerous fights at Shaw, both between blacks and whites and among students of the same race, . . . both during school hours and in the evening.
>
> Tension . . . is at an incendiary point. The school officials spend a great portion of their time disciplining students in an attempt to control this situation. In January . . . black students attempted to organize a walkout. Such walkouts have occurred in a number of the other schools in the area. Shaw High officials were forced to call police to the school.[54]

The court found that allowing the wearing of buttons and insignia would "exacerbate an already tense racial situation," and "inevitably" disrupt the educational process.[55] In *Augustus*, a federal district court issued an injunction banning the display of the Confederate battle flag on clothing or elsewhere, and the use of the name "rebels" in connection with athletic teams, at Escambia High School in Florida. It was found that:

> During the 1972-1973 school year, the fourth year of significant integration, Escambia High was afflicted with racial disturbances within the student body, slightly less than eight percent of which was black. Four massive confrontations involved major interracial fighting. After the first, in November, law enforcement officers were called in to restore order, and they remained for the rest of the academic year. The school had to be closed twice. In addition to the four major disturbances, there were numerous lesser ones, including small-scale fights and walkouts.[56]

One source of the racial tension was found to have been black student demands to abolish the school's use of the Confederate symbols.[57]

There were dissenting opinions in both cases, however—in *Guzick* on the ground the wearing of the buttons would not be likely to provoke disorder, and in *Augustus* on the ground that students had a civil right to use the Confederate symbols.[58]

Does Tinker Authorize Prior Restraint?

There is no question but that school officials may constitutionally punish students who distribute literature that disrupts or threatens to disrupt school operations, if they are able to make a sufficiently strong factual showing. But what is unresolved—because it was not clearly stated by *Tinker*—is whether officials may restrain distribution of such literature. Some courts in high school cases have interpreted its allowing of a "prohibition" of distribution of literature as allowing prior restraint by means of screening literature. They have justified their holdings on the basis of the relative immaturity of high school students, a rationale not mentioned in *Tinker*. Other courts have disagreed (that *Tinker* authorizes restraint).

High School. Three Courts of Appeals have interpreted *Tinker* to allow prior restraint based on forecasts of disruption in high schools. They would allow a formal system of pre-publication examination and screening of copy, if it is based on a rule clearly stating what content may be prohibited, and under what conditions. But the fact that *Tinker* did not state it was allowing "prior restraint" and did not explicitly authorize screening has caused the courts to fail to lay a strong doctrinal justification for their actions. They have simply vaguely cited *Tinker* and sometimes other authority—often one another—said children may be accorded lesser First Amendment protection than adults, then themselves taken the step of authorizing screening. One Court of Appeals has disagreed with this interpretation, stating *Tinker* authorizes only punishment.

None of the cases has upheld either an actual prior restraint or a rule authorizing one. In each case actual prior restraints have been disallowed because evidence of coming disruption was lacking or insufficient, and rules struck down because they lacked adequate standards and procedural safeguards.

The Second Circuit ruled restraint is allowable in *Eisner* v. *Stamford Board of Education*, 1971.[59] The court noted that *Tinker* had said "speech in public secondary schools may be forbidden if school authorities reasonably 'forecast substantial disruption of or material interference with school activities,' "[60] and interpreted these words as allowing restraint by means of an administrative screening mechanism.[61] Similarly, the Fourth Circuit approved the principle of screening based upon a forecast of disruption in *Quarterman* v. *Byrd, Baughman* v. *Freienmuth* and *Nitzberg* v. *Parks*. The Second and Fourth Circuits both rested their holdings on the idea that the relative immaturity of high school students justifies according them less freedom of speech than adults.[62] And the Fifth Circuit in *Shanley* v. *Northeast Independent High School District* said expression by high school students may be "prohibited altogether" under a forecast of disruption, and also that expression could be subjected to screening under "clear and reasonable" regulations. The court did not explicitly mention the relative immaturity of high school students, but rested its allowing of prior restraint on *Eisner*, which had.[63]

In addition, in *Vail* v. *Board of Education of Portsmouth School District*, a federal district court indicated prior restraint by means of "prohibiting" distribution of material would be allowable if based on a factual forecast of disruption.[64] But the court did not suggest that school authorities could examine material prior to distribution. It seemed to suggest otherwise,[65] and a later consent decree in the case specified there would be no prior review of content.[66] And in *Rowe I* another federal district court said disruption caused by incitement to violation of school rules could be the subject of a prior restraint scheme.[67] But in a second opinion in the same case (*Rowe II*), the court speculated:

> It may be that no system of prior restraints in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional.[68]

Disagreeing that *Tinker* authorizes restraint was the Seventh Circuit, in two cases. In *Fujishima* v. *Board of Education*, 1972, the court, in striking down an all-encompassing restraint, held that the *Tinker* forecast rule did not authorize schools to require students to submit the literature to officials for approval prior to dissemination; instead, it meant officials could punish students

whose already-disseminated expression was about to interfere with school discipline.[69]

Also, in *Jacobs* v. *Board of School Commissioners*, 1973, the court, in striking down for vagueness and overbreadth a regulation barring distribution of potentially "disruptive" literature, said it did not understand *Tinker* to authorize "suppression" of student speech when it did not "have a sufficiently close relationship with action to be treated as action."[70] The court did not use the words, "prior restraint."

Another potential barrier to prior restraint is that some courts have indicated their doubts about the constitutionality of pre-publication examination of newspaper copy, on the ground that the delay involved would destroy the news value of the newspaper. In *Sullivan II* the court said:

> Because the most important aspect of a newspaper is its timeliness, even a 24-hour period may be too great. . . . In the case of a daily, a 24-hour delay would completely destroy the newspaper's effectiveness.[71]

In *Rowe II* the court said:

> It may be that no system of prior restraint in the area of student publications can be devised which imposes a restraint sufficiently short-lived and procedurally protected to be constitutional.[72]

Antonelli v. *Hammond* found it "extremely doubtful" that "adequate procedural safeguards could ever be formulated supporting prior restraint of a weekly newspaper." The court added, "Newspaper censorship in any form seems essentially incompatible with freedom of the press."[73] The statements are only *dicta*, but they do indicate a possible future barrier to restraint.

Currently, restraints in high schools based on forecasts of disruption are constitutional in the Second, Fourth and Fifth Circuits, in all of which they may be carried out by means of pre-publication examination of copy; and they are unconstitutional in the Seventh. Their status in other circuits remains to be decided. In the Ninth Circuit, restraints based on a forecast of disruption may be applied after distribution of literature.[74]

The writer believes restraint for fear of interruption of children's education is seldom justified under *Tinker*. Evidence of disruption, in reported and unreported cases, and in the literature of controversies that never became court cases, has been rare.[75]

And, under most conditions involving student literature, it would seem impossible to get a sufficient evidentiary basis that disruption *will* occur sufficiently in advance of the occurrence of disruption to impose a restraint. Restraint might be imposed in situations like that in *Karp*, but the difficulty there is that it is impractical to recall several hundred to several thousand pieces of literature after it has been seen that they were instigating disruption. And, as will shortly be indicated, several courts have ruled school officials must first attempt to regulate the reactors to expression before regulating the expression.

College. There is no evidence that prior restraint is allowable in college when it would not be allowable in the outside world. College cases have not completely foreclosed the possibility that prior restraint might be allowable under some circumstances, but neither has the Supreme Court completely foreclosed the possibility of restraint in the non-school world. In either case the circumstances that would justify restraint would be extreme: the Supreme Court has never allowed a prior restraint against newspapers, and there have been no reported cases upholding prior restraints in college.

Only a few cases have discussed the possibility of prior restraints in college. The court in *Marin* v. *University of Puerto Rico* speculated that restraints on university campuses might conceivably be permissible "when material disruption is clearly predictable."[76] But the three other cases involving restraints (*Channing Club* v. *Board of Regents of Texas Tech University, Antonelli* v. *Hammond* and *Gay Students of University of New Hampshire* v. *Bonner*) have struck them down, citing the doctrine applicable in the non-school world.[77] The Supreme Court has said on two occasions that First Amendment protection on college campuses is the same as in the community at large.[78] That doctrine is that there is a "heavy presumption" against prior restraint.[79] The evidence is that restraint is not allowable except in exceptionally unusual, grave situations. Such situations would have to pose more peril than that involved in *Nebraska Press Association* v. *Stuart*, 1976, when the Supreme Court refused to approve restraint of newspaper publicity that it was argued might endanger a murder suspect's right to a fair trial.[80] And, they would have to pose more peril than that involved in *New York Times* v. *United States*, when

the court refused to uphold restraint of a historical study of the decision-making process in the Vietnam War, despite the argument that publication could pose a threat to national security.[81]

Design of Rules for Punishment or Restraint

All courts that have discussed the matter have insisted that rules used to sanction expression that threatens or causes interference with school functions be designed so as to define precisely what is prohibited. They have insisted that the rules not be vague—fail to give notice of precisely what is forbidden—and also that they not be overbroad—cover more than may constitutionally be prohibited. And in fact in every scholastic case in which rules proscribing potentially disruptive expression were involved, the rules were struck down as vague or overbroad, or both. In *Eisner*, the court struck down for vagueness and lack of procedural safeguards a rule authorizing restraint of material which "either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, or will cause violence or disorder. . . ."[82] The court said the vice of the regulation was that it did not proscribe only *substantial* distribution of such material, since only a large quantity would be likely to cause disruption. It did not require further specificity, but it suggested the rules describe "the kinds of disruptions, and their degree," that would justify censorship, and those that would not.[83] In *Nitzberg* the court struck down a similarly worded rule, because it failed to tell what constitutes proscribable interference with school activities, failed to detail the criteria by which an administrator might predict disruption, and failed to specify the kinds and amounts of material likely to cause disruption.[84] And in *Baughman* and *Shanley* the courts specified that regulations must specifically detail the kinds of literature likely to cause disruption.[85]

In *Jacobs* the court also struck down as vague and overbroad a regulation barring distribution of literature that is "either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes. . . ."[86] The court said the regulation was vague in that it specified neither what constituted a "normal educational purpose" nor when disruption became "sig-

nificant." It said the regulation was overbroad because "expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection."[87]

Readers to be Regulated Before Writers

Tinker had not explicitly said that school officials must first regulate those who disturb the peace in reaction to expression before regulating the expressors. It had stopped short of that, stating that speech may not be regulated *for fear* it would cause a disturbance. But later cases, including a Supreme Court case and several lower court scholastic press cases, have held authorities first must try to regulate the disorderly audience before regulating the expressor. The *Terminiello* case best stated the philosophy justifying that procedure:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, . . . and even stirs people to anger. Speech . . . may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization either by legislatures, courts, or dominant political groups.[88]

Terminiello had not explicitly held that a disorderly audience must be regulated before the speaker, although the statement quoted may imply that. But a later Supreme Court case, *Gregory* v. *City of Chicago*, did explicitly so hold. It disallowed the conviction, on breach of the peace charges, of demonstrators who had been arrested after the crowd viewing them had become unruly and broken the peace, and police feared the crowd could no longer be controlled.[89]

Most of the scholastic publications cases that have discussed the matter have been quite explicit that disturbance by an audience does not justify regulating the expressor, and none has disagreed. *Jones* v. *Board of Regents of University of Arizona* held that not only could police not remove from the campus a person attacked while distributing literature—they had the obligation of protecting him from attack.[90] *Jacobs* noted that the simple fact that expres-

sion causes disorder does not justify its regulation, and said speech may not be suppressed unless it is inseparable from action (as would be a shout of fire in a crowded theatre).[91] *Sullivan I* specified that a hostile reaction from readers does not justify punishing the literature distributors,[92] and in *Sullivan II* the same court said exceptions might be made in an emergency such as a race riot, and when officials after "repeated good faith efforts" had been unable to quell the disruptive reactors.[93] The principle that illegal conduct by reactors does not justify regulating expression was also approved of in the *Gay Students* case,[94] and also, in *dicta*, by two federal Circuit Courts.[95] Because of the Supreme Court rulings and unanimous agreement by the lower courts that have considered the issue in student press cases, one would not expect this rule of law to be often ignored. To the extent it is followed it essentially disposes—except in such situations as riots and near-riots—of "material and substantial interference" as a justification for punishment of expressors, or restraint. Written expression is not by itself, apart from reactions by readers, and apart from its distribution, disruptive (and disruption caused by distribution is properly remedied, courts have ruled, by regulating the time, place, and manner of distribution[96]).

SUMMARY AND CONCLUSIONS

IN THE GREAT majority of post-*Tinker* cases, in both high school and college, when school officials alleged threatened or actual interference with school functions, courts have ruled in favor of the student press rather than those who have censored and punished it.

The Supreme Court has said that constitutional protection of the college press is the same as that applying to the press at large, and all but a few decisions applying the *Tinker* principles have given it as much protection as the court has decreed applicable to the press at large. The decisions that have held the high school press not entitled to as much protection as the press at large, it will be remembered, authorized prior restraint on the basis of the relative immaturity of high school students. Two points ought to be made about those decisions: 1) the "relative immaturity"

rationale was not mentioned in *Tinker*, and may be inconsistent with it; 2) there is disagreement among the federal circuit courts as to whether *Tinker* authorizes restraint. Thus, although it is the law that restraint may be applied in the circuits that have authorized it, it ought not to be regarded as particularly authoritative law until the Supreme Court has—or at least other circuits have—spoken, and, one hopes, established a convincing rationale for restraint or non-restraint.

The evidence collected here shows that for the most part, the restrictions that may legally be imposed on the student press under the "material and substantial interference" criterion are potential restrictions only—the conditions that justify their application seldom occur. It is clear that sanctions may be imposed if literature causes or threatens material and substantial interference with school activities. But only one case in which there was actual interference found it sufficient to justify sanctions. Only three found evidence of threatened interference sufficient—and one involved apparently weak evidence; the other two involved uncommon situations (one, words best seen as constituting action; the other, expression in a pre-existing state of disorder).

Further, while three circuits have held restraint may be imposed over potentially disruptive material, none upheld a restraint. All struck down restraints or rules allowing them, on the ground the material was not proscribable, or the rules were flawed (by vagueness or overbreadth), or both. It is true that the rules may be redrawn, but in the absence—or at least the scarcity—of literature to which they may legally by applied, to the extent the law is followed (and by-passing consideration of the fact that self-censorship caused by fear of legal sanctions is itself a restriction on content), the restrictions are wholly or largely only potential. Considering that fact, and considering also that several courts have decreed that it is the duty of courts to regulate the disruptive reactors to expression before regulating the expression, the student press is under the "material and substantial interference" criterion, from a legal standpoint, quite free.

Whether apart from court doctrine the student press is free is another subject. There is much evidence that it has not been. Many recent surveys have indicated that censorship by faculty members and administrators has been widespread.[1] The existence

of some of the cases collected here also attests to that fact. Further research ought to be done to find out whether censorship by school officials has declined, stayed at the same level or increased in the mid-1970s. One might expect it would decrease as a result of the publicizing of the many court decisions that have decreed student press freedom. On the other hand, one should not assume school officials will know the law, or that they will follow it. There are pressures toward censorship, and the pressures would not disappear simply because court doctrine has become relatively liberal. Only a relatively few of the cases of punishment and censorship of expression have reached the courts. The magnitude of this extra-legal restriction has been so great that it is an important subject for research.

NOTES

Introduction

1. 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

2. See John E. Nichols, "Federal Constitutional Protection of Freedom of the High School and College Student Press" (Ph.D., University of Wisconsin-Madison, 1976. Ann Arbor: University Microfilms, 76-28,166), 19-23 and accompanying notes.

3. Among the most notable cases were Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), *cert.* den., 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961); Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966), and Blackwell v. Issaquena County Board of Education, 363 F. 2d 749 (5th Cir. 1966). See also Nichols, *supra*, n. 2, 51-63 and accompanying notes.

4. See, e.g., Smith v. University of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969) (speaker ban); Marin v. University of Puerto Rico, 377 F. Supp. 613 (D.P.R. 1973) (campus demonstrations); University of Southern Mississippi Chapter of American Civil Liberties Union v. University of Southern Mississippi, 452 F. 2d 564 (5th Cir. 1971) (recognition of organizations); Crews v. Cloncs, 432 F. 2d 1259 (7th Cir. 1970) (long hair); Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970) (wearing of blue jeans). Other cases are cited in Nichols, *supra*, n. 2, 30-32 and accompanying notes.

The *Tinker* Case

1. *Supra*, n. 1, Introduction.

2. 393 U.S. at 509, citing Burnside v. Byars, 363 F. 2d 744, 749 (5th Cir. 1966).

3. See n. 4 to Introduction, *supra*.

4. Petitioners' Brief to Supreme Court, 4-6; Supreme Court Record, 27-9, 31-2, 39-40, 50-51.

5. Petitioners' Brief, 7-8; Respondents' Brief, 5-6.

6. 258 F. Supp. 971, 972-3 (S.D. Iowa 1966).

7. 258 F. Supp. at 972-3.

8. 383 F. 2d 988 (8th Cir. 1967).

9. Petitioners' Brief, 20-22.

10. Amicus' Brief, 4-5.

11. Amicus' Brief, 11, 12, 15.

12. Petitioners' Brief, 27.

13. Petitioners' Brief, 10-11, citing Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 2d 1628 (1943).

14. Respondents' Brief, 22, 27-8, 30, 35.

15. Respondents' Brief, 23-25, citing Adderley v. Florida, 285 U.S. 39, 87 S. Ct. 242, 247, 17 L. Ed. 2d 149 (1966); Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (Justice Hugo L. Black, dissenting).

16. 393 U.S. at 509.

17. Burnside, *supra*, n. 2; Blackwell, 363 F. 2d 749. Blackwell allowed regulation on the ground distribution of the buttons had disrupted a Mississippi high school; Burnside found no disruption, and disallowed regulation.

18. 393 U.S. at 509.

19. 393 U.S. at 506, citing Meyer, *supra*, n. 13, and Bartels v. Iowa, 262 U.S. 404, 43 S. Ct. 628, 67 L. Ed. 1047 (1923).

20. 393 U.S. at 506-7, citing Barnette, *supra*, n. 13, 319 U.S. at 637.

21. 393 U.S. at 507, citing McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 L.L.R. 674 (1948); Wieman v. Updegraff, 344 U.S. 183, 195, 73 S. Ct. 215, 97 L. Ed. 216 (1952) (concurring opinion); Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962); Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); and Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968).

22. 393 U.S. at 508.

23. 393 U.S. at 509, citing Burnside, 363 F. 2d at 749.

24. "No indication," 393 U.S. at 508; "no finding and no showing," "independent examination of the record," 509; "evidence," "specific showing," 511; "showing," 513; "record does not demonstrate any facts," 514.

25. 393 U.S. at 508-9, citing Terminiello v. Chicago, 337 U.S. 1, 69 S. Ct. 894, 95 L. Ed. 1131 (1949).

26. 393 U.S. at 509. See Terminiello, *ibid.*, at 3.

27. 393 U.S. at 510, text and n. 4, 5; 511.

28. 393 U.S. at 512.

29. 393 U.S. at 512, citing Keyishian, *supra*, n. 21, in turn citing Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), and United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

30. 393 U.S. at 511-12, citing Meyer, *supra*, n. 13, 262 U.S. at 402.

31. 393 U.S. at 514-15.

32. At 520-21.

33. At 522-3, citing Waugh v. Board of Trustees of University of Mississippi, 237 U.S. 589, 596-7, 35 S. Ct. 720, 59 L. Ed. 1131 (1915).

34. See Black's opinion for the court in Adderley v. Florida, *supra*, n. 15, 385 U.S. at 47; see also Brown v. Louisiana, *supra*, n. 15, 383 U.S. at 162-3, 166 (dissent), and Cox v. Louisiana, 379 U.S. 536, 577, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965).

35. 393 U.S. at 523.

36. At 518, 526.

37. At 526.

38. The clear and present danger standard as applied in Schenck and other national security cases through the 1950s gave little protection to freedom of speech. See Thomas I. Emerson, *Toward A General Theory of the First Amendment* (New York: Random House, 1963, 1966), 48-58; Walter Berns, *Freedom, Virtue and the First Amendment* (Baton Rouge: Louisiana State University Press, 1957), 49-57. There is evidence its author, Justice Oliver Wendell Holmes, Jr., did not initially intend to have it give much protection. See Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *The Journal of American History* 58:24 (1971). In cases regarding criticism of the courts, however, it has given a good deal of protection. See, e.g., Bridges v. California, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941). In brief, the Supreme Court's lack of consistency in applying the doctrine may be viewed as evidence the court sometimes bows to hysteria, rather than as evidence "the" clear and present danger test (there are several variations) gives little protection.

39. 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

40. 395 U.S. 444, 447, 89 S. Ct. 1927, 23 L. Ed. 2d 430.

41. See text accompanying n. 59-74, "Interpretations of Tinker" section, *infra*.

42. For a discussion of the difficulty in distinguishing between punishment and restraint, see Nichols, *supra*, n. 2, Introduction, 98-100 and accompanying notes.

43. Niemotko v. Maryland, 340 U.S. 268, 271-2, 71 S. Ct. 325, 95 L. Ed. 267 (1951).

Interpretations of *Tinker*

1. Federal court jurisdiction is so limited by U.S. Const., Art. III, Sec. 2, and its interpretation in Muskrat v. United States, 219 U.S. 346, 356-357, 31 S. Ct. 250, 55 L. Ed. 246 (1911).

2. 333 F. Supp. 1149 (S.D. Tex. 1971).

3. 333 F. Supp. at 1169, 1176. The judgment was later reversed on the ground the student's conduct had constituted insubordination.

4. 363 F. 2d 744, 746-9 (5th Cir. 1966).
5. 307 F. Supp. 1328 (S.D. Tex. 1969).
6. 307 F. Supp. at 1334-5.
7. At 1341-2.
8. 307 F. Supp. 517, 519 (C.D. Cal.).
9. At 521-2, 527.
10. 363 F. 2d 749, 749-752 (5th Cir. 1966).
11. At 754.
12. At 751, text and n. 2, 3; 752, text and n. 4, 5.
13. At 754, citing Burnside, 363 F. 2d at 748.
14. At 754.
15. 279 F. Supp. 190 (D. Tenn. 1968), aff'd, 407 F. 2d 834 (6th Cir. 1969), *cert.* gtd., 396 U.S. 817, 90 S. Ct. 145, 24 L. Ed. 2d 69 (1969), *cert.* dism'd as improv. gtd., 397 U.S. 31, 90 S. Ct. 779, 25 L. Ed. 2d 27, reh. den., 397 U.S. 1018, 90 S. Ct. 1230, 25 L. Ed. 2d 432 (1970).
16. 279 F. Supp. at 195, 200-201.
17. 279 F. Supp. at 204, citing Blackwell, *supra*, n. 10.
18. 407 F. 2d at 836.
19. See citations at n. 15, *supra*.
20. 397 U.S. at 33, 35-6.
21. 436 F. 2d 618 (9th Cir. 1970). See also 397 F. 2d 259 (9th Cir. 1968).
22. See 436 F. 2d at 619.
23. 436 F. 2d at 621-2.
24. Although no instances of literature causing disruption were found other than those cited here, in search of both the legal and non-legal literature of conflict involving the student press, which located many instances that never reached the courts (for sources see Nichols, *supra* n. 2, "The Tinker Case" section, 5, n. 16-19), other instances could have occurred without reaching either the courts or the press.
25. The Baker court rather casually accepted weak evidence of an apparently mild sort of disruption. Blackwell prohibited expression mostly because its distributors had been unruly, behavior which might have been remedied by disciplining the distributors and regulating the time, place, and manner of distribution.
26. "Some Points For the Principal to Ponder on His Way to Court: A Definition of 'Material and Substantial Disruption,' " 12 South Texas L. Jour. 323, 343 (1971).
27. Healy v. James, 408 U.S. 169, 189, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).
28. Grayned v. City of Rockford, 408 U.S. 104, 118-19, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
29. Strevell, 350.
30. 393 U.S. at 508.
31. See, 1) Cintron v. State Board of Education, 384 F. Supp. 674 (D.P.R. 1974); 2) Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974); 3)

and 4) Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592 (D.N.H. 1973) (emphasis by the court), and Jacobs v. Board of School Commissioners of City of Indianapolis, 490 F. 2d 601 (7th Cir. 1973), dism'd as moot, 420 U.S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975); 5) Hannahs v. Endry, no. 74-1196 (5th Cir. June 17, 1974); 6) Scoville v. Board of Education of Joliet Township, 425 F. 2d 10, reversing 286 F. Supp. 988 (N.D. Ill. 1968), *cert.* den., 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970); 7) Rowe v. Campbell Union High School District (Rowe I), Civ. No. 51060 (N.D. Cal. 1970).

32. Rowe I, at 8-9.

33. Except for one, Segall v. Jacobsen, 295 F. Supp. 1121, 1122 (S.D.N.Y. 1969), in which the facts were unclear. Segall had been transferred to another school after allegedly distributing a forged issue of the high school newspaper, said to contain "libelous and scurrilous material." The court refused a preliminary injunction to block the transfer on the ground there had been no irreparable injury and it was unclear whether Segall's actions had been disruptive.

34. 477 F. 2d 171, 173 (9th Cir.).

35. 477 F. 2d at 175-6.

36. At 175.

37. See 1) Channing Club v. Board of Regents of Texas Tech University, 317 F. Supp. 688 (N.D. Tex. 1970); 2) People v. Keough, 38 A.D. 2d 293, 329 N.Y.S. 2d 80 (App. Div., 4th Dept., 1972), rev'd, 31 N.Y. 281, 338 N.Y.S. 2d 618, 290 N.E. 2d 819 (1972); 3) Jones v. Board of Regents of University of Arizona, 436 F. 2d 618 (1970); 4) Gay Students Organization of University of New Hampshire v. Bonner, 367 F. Supp. 1088 (D.N.H. 1974).

38. See 1) Channing Club, 317 F. Supp. at 691; 2) Keough, 290 N.E. 2d at 820; 3) Jones, 436 F. 2d at 621; 4) Gay Students, 367 F. Supp. at 1100.

39. 419 F. 2d 195 (6th Cir. 1969), *cert.* den., 399 U.S. 906, 90 S. Ct. 2191, 26 L. Ed. 2d 562 (1970).

40. 317 F. Supp. 1253 (S.D. Miss. 1970), aff'd without opinion, 440 F. 2d 1351 (5th Cir. 1971).

41. 419 F. 2d at 196.

42. 419 F. 2d at 197-8.

43. *Ibid.*

44. 419 F. 2d at 199.

45. 419 F. 2d at 206. Judge Anthony J. Celebrezze cited Tinker, 393 U.S. at 509, 514; Pickering v. Board of Education, 391 U.S. 563, 578-9, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (appendix to opinion of court); New York Times v. Sullivan, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); Pennekamp v. Florida, 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946); Norris v. Alabama, 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935).

46. 419 F. 2d at 207. Judge Celebrezze noted that administrators themselves had not seemed to think disruption likely: one had said the leaflets "could conceivably" cause disruption, and another had said of their distribu-

tion, "I couldn't truthfully say it was a threat as such." 419 F. 2d at 206, n. 1.

47. 419 F. 2d at 211, citing Brandenberg, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 430 (1969); Pickering, *supra*, n. 45.

48. 399 U.S. 906, 90 S. Ct. 2291, 26 L. Ed. 2d 562 (1969).

49. 399 U.S. at 908, citing Tinker, *supra*, n. 45, 393 U.S. at 508.

50. 317 F. Supp. at 1257, 1260, 1262, 1275.

51. 317 F. Supp. at 1275-7.

52. 317 F. Supp. at 1277, citing Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949).

53. Guzick, 305 F. Supp. 472 (N.D. Ohio 1969), aff'd, 431 F. 2d 594 (6th Cir. 1970), *cert.* den., 401 U.S. 948, 98 S. Ct. 941, 28 L. Ed. 2d 231 (1971); Augustus, 361 F. Supp. 383 (N.D. Fla. 1973), modified, 507 F. 2d 152 (5th Cir. 1975).

54. 305 F. Supp. at 475.

55. 305 F. Supp. at 477.

56. 507 F. 2d at 155.

57. *Ibid.* The Fifth Circuit remanded the case for consideration of whether an injunction against misuse of the symbols would be preferable to a prohibition.

58. Guzick, 431 F. 2d at 601; Augustus, 507 F. 2d at 159.

59. 440 F. 2d 803, 810 (2d Cir. 1971).

60. 440 F. 2d at 805, 806-807, citing Near, 283 U.S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357; Chaplinsky v. New Hampshire, 315 U.S. 568, 571-2, 62 S. Ct. 766, 86 L. Ed. 1931 (1942); Tinker, *supra*, n. 45, 393 U.S. at 514.

61. 440 F. 2d at 810-11.

62. Eisner, 440 F. 2d at 807, 808 n. 5; Quarterman, 453 F. 2d 54, 57-8, 58 n. 7 (1971); Baughman, 478 F. 2d 1345, 1348 (1973); Nitzberg, No. 74-1839, slip op. at 4-5 (Apr. 14, 1975).

63. 462 F. 2d at 970 (5th Cir. 1972), citing Eisner, 440 F. 2d 803.

64. 354 F. Supp. 592, 599 (D.N.H.), citing Eisner, 440 F. 2d at 806-7, and Justice Stewart's concurring opinion in Tinker, 393 U.S. at 515.

65. The court said school officials could promulgate time, place and manner regulations, then added: "This does not mean, however, that the School Board may require a student to obtain administrative approval of the time, manner, and place of the particular distribution he proposes. Rather, the Board has the burden of telling students when, how, and where they may distribute materials, consistent with the basic premise that the only purpose of any restrictions on the distribution of literature is to promote the orderly administration of school activities by preventing disruption and not to stifle freedom of expression." [354 F. Supp. at 598]

66. Civ. Act. No. 72-178, slip order, 4 (Apr. 18, 1974).

67. Rowe I, *supra*, n. 31, slip op., 9, 17 n. 18, citing Molpus v. Fortune, 311 F. Supp. 240, 249 (N.D. Miss. 1970).

68. Rowe v. Campbell Union High School District, Civ. No. 51501 RFP, slip op., 2 (N.D. Cal., Feb. 4, 1971).

69. 460 F. 2d 1355, 1358.

70. *Supra*, n. 31, 490 F. 2d at 604, 606, citing United States v. Dellinger, 472 F. 2d 340, 360 (7th Cir. 1972), and Braxton v. Municipal Court, 10 Cal. 2d 138, 109 Cal. Rep. 897, 514 P. 2d 697 (1973).

71. *Supra*, n. 2, 333 F. Supp at 1160 n. 13.

72. Slip op., 2.

73. 308 F. Supp. 1329, 1335 n. 6 (D.Mass. 1970).

74. Jurisdiction of the various circuits is: 2d: Connecticut, New York, Vermont; 4th: Maryland, North Carolina, South Carolina, Virginia, West Virginia; 5th: Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Canal Zone; 9th: Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Hawaii, Alaska, Guam; 7th: Illinois, Indiana, Wisconsin.

75. See *supra*, n. 24 and accompanying text.

76. 377 F. Supp. 613, 628 (D.P.R. 1973, reh. den., 1974).

77. Channing Club, *supra*, n. 37, 317 F. Supp. at 691; Antonelli, *supra*, n. 73, 308 F. Supp. at 1335; Gay Students, *supra*, n. 37, 367 F. Supp. at 1098.

78. Healy v. James, *supra*, n. 27, 408 U.S. at 180; Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 671, 93 S. Ct. 1197, 35 L. Ed. 2d 618 (1973).

79. New York Times v. United States, 413 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); Healy v. James, *supra*, n. 27, 408 U.S. at 184.

80. 427 U.S. 539, 96 S. Ct. 2791, 48 L. Ed. 2d 683 (1976).

81. *Supra*, n. 79.

82. 440 F. 2d at 805, 811.

83. 440 F. 2d at 809.

84. Nitzberg, *supra*, n. 62, 5, 7, 11.

85. Baughman, 478 F. 2d at 1349-50; Shanley, 462 F. 2d at 977.

86. 490 F. 2d at 604-5.

87. 490 F. 2d at 605-6.

88. 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

89. 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969). The decision, however, was based in part on due process grounds: there was no evidence the demonstrators had violated the law, barring breach of the peace, that they had been charged with breaking. 394 U.S. at 112.

90. *Supra*, n. 37, 436 F. 2d at 621.

91. *Supra*, n. 31, 490 F. 2d at 605-6, citing Braxton v. Municipal Court, *supra*, n. 70.

92. See 475 F. 2d at 1073, where the 5th Circuit Court reproduced the injunction. The court said, however, that distribution of obscenity and actionable libel may be prohibited.

93. 333 F. Supp. at 1161, 1170-71.

94. *Supra*, n. 37, 367 F. Supp. at 1100.

95. Eisner, *supra*, n. 59, 440 F. 2d at 809; Shanley, 462 F. 2d at 974 (5th Cir. 1972).

96. See New Left Education Project v. Board of Regents of University of Texas, 326 F. Supp. 158, 164 (W.D. Tex. 1970), appeal dism'd, 472 F. 2d

218 (5th Cir. 1973), dism'd as moot, 414 U.S. 807, 94 S. Ct. 118, 38 L. Ed. 2d 43 (1973); Jones v. Board of Regents, *supra*, n. 37, 436 F. 2d at 620; Jacobs, *supra*, n. 31, 490 F. 2d at 609. Other cases are given in Nichols, *supra*, n. 2, Introduction, 297-8 and accompanying notes.

Summary and Conclusions

1. A recent survey of more than 800 colleges found that 39 per cent of student newspaper editors were required to submit copy for review, most often by the newspaper adviser, prior to publication. Louis E. Ingelhart, *The College And University Student Press:* An Examination of Its Status and Aspirations and Some of the Myths Surrounding It (Muncie, Ind: By the Author, Department of Journalism, Ball State University, 1973), 13. The Student Press in America Archives has collected documentation of many instances of institutional censorship of student newspapers. A summary of the Archives collection is given in Ingelhart, 19-20. In a 1964 survery of more than 800 colleges, Williamson and Cowan found that 42 per cent of editors of student newspapers were required to submit copy regularly to a faculty member or administrator for review prior to publication, and .5 per cent of editors said censorship had occurred against their wishes. [Edmund G. Williamson and John L. Cowan, The American Student's Freedom of Expression (Minneapolis: University of Minnesota Press, 1966), 129.] Other survey data concerning extra-legal repression are given in Nichols, *supra*, n. 2, Introduction, 3, Text and Notes.